Unfortunately, however, the parties appear to have presented the Court with a flawed allocation formula that fails to effect an equitable worldwide allocation of the settlement fund. The proposed settlement agreement purports to allocate the settlement fund on the basis of raw population figures, based solely upon the estimated number of Jewish Nazi victims from Greater Hungary currently residing in each country throughout the world.[2] Such an exclusively population-driven allocation formula overlooks the fact that needy Hungarian Jewish survivors are not randomly distributed throughout the world on the basis of raw population figures. Rather, they are disproportionately clustered in countries such as Hungary where surviving Jewish Nazi victims have experienced particularly severe economic deprivation. Thus, to the extent that poverty among elderly Jewish Nazi victims is more intense and widespread in Hungary than in the United States and other developed countries, the raw population figures should be modified to account for the disproportionately high concentration of needy class members in Hungary. Otherwise, a disproportionate share of the settlement fund will be allocated to relatively prosperous nations like the United States with large Hungarian Jewish survivor populations, but relatively fewer Hungarian Jewish Nazi victims in great need. See *In re Holocaust Victim Assets Litig.*, 302 F. Supp.2d 89, *reh'g denied*, 311 F. Supp.2d 169 (EDNY 2004) (rejecting national population quotas as basis for allocating *cy pres* funds to needy members of the class).[3]

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[2]The settlement agreement currently before the Court proposes the following national allocation based solely on the number of Jewish Nazi victims from Greater Hungary residing in each country: Israel (42.5%); Hungary (22.7%): United States (20.1%); Canada (6.1%); Australia (2.5%); Rest of World (6.1%).

[3]One of the class counsel herein, Mr. Dubbin, has challenged Chief Judge Korman's refusal in the Swiss bank litigation to adopt a worldwide distribution formula based on raw national population quotas. Instead, Chief Judge Korman has allocated the $205 million in *cy pres* funds

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In order to avoid unnecessary delays in distributing the settlement funds, the Hungarian objectors suggest that the bulk of the settlement funds be immediately distributed in accordance with the proposed allocation plan, but that a portion of the funds be retained under Court supervision pending an investigation by the Jewish Conference on Material Claims Against Germany (Claims Conference) into the actual whereabouts of the needy members of the class. If, as the Hungarian objectors believe, there is at least a 10% deviation between needy Jewish survivors residing in Hungary and the raw population figures, the portion of the settlement fund retained by the Court should be re-directed to the support of needy Jewish Nazi victims residing in Hungary.

Counsel respectfully suggests that unless such corrective action is taken, the settlement appears to violate *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997), by permitting settlement counsel for a heterogeneous class to subordinate the interests of one segment of the class - surviving needy Jewish Nazi victims residing in Hungary - to the interests of class members residing in other countries.

2. Reservations Concerning Attorneys' Fees

While much of the necessary factual investigation had been made public by the United States prior to this litigation, and while, in a more perfect world, the United States would have agreed to make an *ex gratia* payment in connection with the loss of the Gold Train assets without incurring costs incident to litigation, the fact remains that it was this litigation that succeeded in inducing the settlement payment. Moreover, it appears that

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designated to help the poor in the Swiss bank case on the basis of where the needy actually reside. See *In re Holocaust Victim Assets Litig.*, 302 F. Supp.2d 89, *reh'g denied*, 311 F. Supp.2d 169 (EDNY 2004) (rejecting national population quotas as basis for allocating *cy pres* funds to needy members of the class). An appeal prosecuted by Mr. Dubbin on behalf of survivors residing in the United States is pending before the Second Circuit. See Docket Nos. 04-1898/99 (2nd Cir.).

plaintiffs' counsel performed admirably in inducing the United States to settle this case. Accordingly, plaintiffs' counsel are clearly entitled to an award of attorneys' fees under the "common fund" doctrine.

A disagreement exists, however, over the appropriate size of the common fund award. Plaintiffs' attorneys correctly note that the Eleventh Circuit has adopted a percentage of recovery theory in calculating common fund class action fees. They argue that the appropriate percentage of recovery in this case is found in the Eleventh Circuit cases awarding between 20%-30% of a settlement fund as attorneys' fees and costs in garden variety commercial litigation. Since plaintiffs' attorneys seek approximately 14% of the settlement fund in fees and costs, they argue that they are well within the common fund fee guidelines in this Circuit.

In response, the Hungarian objectors observe that litigation over Holocaust reparations is not a garden variety commercial exercise. Rather, because of the powerful moral and emotional attributes of Holocaust-related cases, a number of highly qualified lawyers have agreed to press Holocaust-related cases at sub-market rates, establishing a governing fee structure in Holocaust-related litigation that is lower than in the ordinary commercial case. Since the purpose of a common fund fee calculation is to reflect the relevant market for a lawyer's services in a particular case, where, as here, the relevant market is not the usual commercial market, class members are entitled to a fee calculation based on the more advantageous market available to them. In short, since highly qualified lawyers were available to prosecute this case pursuant to a sharply reduced fee schedule, it would be inequitable to saddle the Hungarian Gold Train class with a higher commercial fee structure.

No reported fee in a Holocaust-related case has exceeded 5% of the recovery. Indeed, in most cases, the attorneys' fees have been far lower. For example, in the $1.25 billion Swiss bank settlement, the three principal lawyers worked without fee.[4] Chief Judge Korman awarded modest fees to a number of additional lawyers in that case totaling less than $7 million (or ½ of 1% of the $1.25 billion settlement fund). Significantly, Chief Judge Korman denied requests for risk multipliers, finding that the availability of capable lawyers willing to handle the case *pro-bono* made it inappropriate to charge the plaintiff class as though the Swiss bank case were an ordinary commercial litigation. See *In re Holocaust Victims Assets Litig.*, 270 F. Supp.2d 313 (EDNY 2002). See also *In re Holocaust Victims Assets Litig.*, 302 F. Supp.2d 89, *rehearing denied,* 311 F. Supp.2d 363 (EDNY 2004)(denying fees). Thus, to the extent the prevailing Eleventh Circuit common fund fee structure of 20%-30% of recovery reflects a risk factor needed to attract competent counsel, it is inappropriate in a setting where such market inducements are demonstrably not necessary.

Similarly, in the German slave labor, insurance and banking cases that were settled by the establishment of a 10 billion DM (approximately $5.2 billion) German Foundation designed to compensate Holocaust victims, the parties established a fee structure of between 1.25%-1% to compensate the more than 50 law firms involved in the litigation. See *In re Nazi Era Cases Against German Defendants Litig.*, 198 FRD 428 (D.N.J.

[4]Counsel has served since February, 1999 as court-designated lead settlement counsel in the Swiss bank cases. In the interest of full disclosure, one of the class counsel in this litigation - Samuel Dubbin - has represented a number of objectors in the Swiss bank proceedings. See *In re Holocaust Victim Assets Litig.*, 302 F. Supp.2d 89, 117-120, *reh'ing denied*, 311 F. Supp.2d 363 (EDNY 2004)(denying objections and fees). Mr. Dubbin has appealed the denial of fees to the Second Circuit. The issue is awaiting decision.

2000)(describing settlement structure).[5] Two arbitrators appointed with the cooperation of the German government – Kenneth Feinberg and Nicholas deB Katzenbach – awarded fees totaling 119 million DM (approximately $60 million, or 1.2% of the settlement fund) to numerous attorneys on the basis of their relative contributions to the success of the enterprise.[6]

Finally, in the Austrian banks litigation, involving a $40 million settlement fund, plaintiffs' counsel sought costs and fees approximating 5% of the settlement fund. Judge Kram, recognizing the unique nature of the Holocaust-related cases, reduced the costs and fees to approximately 3% of recovery. *In re Austrian and German Holocaust Litigation*, 2003 U.S. Dist. LEXIS 2440 (February 21, 2003).

In this case, with a settlement fund of $25.5 million, the Hungarian objectors believe that an award of costs and fees in excess of 5% of recovery would impose an unfair burden on the settlement class by permitting plaintiffs' attorneys to recover costs and fees in excess of the prevailing rates governing Holocaust-related cases. The Hungarian objectors note that an award of 5% of recovery, as opposed to 14% of recovery, would free sufficient assets to provide needy surviving Jewish Nazi victims residing in Hungary with the funds needed to close the gap between an allocation based on raw population figures and an allocation based on the actual number of needy persons residing in each country.

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[5]Counsel herein has served since August 30, 2000 as the United States lawyer-appointee to the Board of Trustees of the German Foundation.

[6] Counsel was awarded a fee of DM 10 million for work in connection with the litigation and negotiation that brought the Foundation into being. See *Zeisl v. Watman*, 317 F.3d 191 (2nd Cir. 2003)(upholding fee awards).

Accordingly, counsel, on behalf of the Hungarian objectors, respectfully urges the Court to condition approval of the proposed settlement on: (1) an agreement that at least 10% of the settlement fund be held under the Court's supervision pending a determination by the Claims Conference as to whether a disproportionate number of needy Jewish Holocaust survivors reside in Hungary requiring a modest re-allocation of the settlement fund to provide additional funds to qualifying class members residing in Hungary ; and (2) an agreement to limit the award of costs and attorneys fees herein to not more than 5% of the settlement fund. If it is not possible to condition the settlement's approval on such terms, the Hungarian objectors formally lodge an objection to the proposed settlement

Dated: July 21, 2005
New York, New York

Respectfully submitted,

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(212) 998-6172
Counsel for Hungarian Objectors

To: Clerk of the Court
United States District Court
for the Southern District of Florida
301 North Miami Avenue
Miami, Florida 33128

Hungarian Gold Train Notice Provider
P.O. Box 1570
New York, New York 10159

Courtesy Copies To:

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Dubbin & Kravetz, LLP

Meghatalmazás

Alulírott, aki 1939 és 1945 között bizonyos időszakban Magyarország 1944-es határain belül éltem, és családi vagyonomat, amely a magyar aranyvonatra kerülhetett, az 1944. évi 1600-as rendelet, vagy az 1944. évi 8306-os rendelet, valamint egyéb hasonló magyar jogszabály, eljárás, vagy gyakorlat alapján a magyar kormány lefoglalta, elkobozta, vagy ellopta, és aki a Miami Florida Szövetségi Bíróság előtt folyó „Magyar Aranyvonat" ügyben a felperes társak keresetéhez csatlakozok

meghatalmazom

Burt Neuborne (John Norton Pomeroy Professor of Law Director, Brennan Center for Justice, New York University School of Law Vanderbilt Hall 40 Washington Squere South, Room 307 New York, NY 10012-1099, Telephone: (212) 998-6172, Email:burt.neuborne@nyu.edu) professzort, hogy a „Magyar Aranyvonat" egyezség alapba kerülő összeg méltányosabb felosztásával és az ügyvédi díj mérséklésével kapcsolatosan engemet képviseljen, illetve eljárjon.

Tudomásul veszem, hogy Neuborne professzor ellenkérelmet nyújt be az ügyben tervezett megállapodással szemben.

Budapest, 2005. július 13.

Authorization

I, above mentioned person, who affirm that I lived in the 1944 borders of Hungary sometime between 1939 and 1945 and my family had property seized, confiscated or stolen by the Hungarian government pursuant to Decree 1600 of 1944, Decree 8306 of 1944, or other similar Hungarian law, policy or practice that could have been on the Hungarian Gold Train and who would be joined member of the plaintiff class in the Hungarian Gold Train case pending in federal court in Miami, Florida,

I authorize

Burt Neuborne (John Norton Pomeroy Professor of Law Director, Brennan Center for Justice, New York University School of Law Vanderbilt Hall 40 Washington Squere South, Room 307 New York, NY 10012-1099, Telephone: (212) 998-6172, Email:burt.neuborne@nyu.edu) to represent me in connection with an effort to obtain a fairer allocation of the Hungarian Gold Train settlement funds, and a lower attorneys' fee in that case.

I understand that Professor Neuborne intends to file appropriate objections to the proposed settlement agreement.

July 13, 2005 Budapest,

Név – Name: **Veres György**

Lakcím -Address: **H- 1092 Budapest Köztelek u. 4/b**

....

Meghatalmazó aláírása

-----Original Message-----
From: Sam Dubbin
Sent: Friday, January 13, 2006 12:40 PM
To: Sam Dubbin
Subject: transcript

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

IRVING and ANA ROSNER, ET AL. Case No. 01-1859-CV-PAS

v. MIAMI, FLORIDA
September 26, 2005
VOLUME I

PAGE 1 TO 167

U.S.A.

FAIRNESS HEARING
BEFORE THE HON. PATRICIA A. SEITZ, J.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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(Court convened at 10:05 a.m.)

MS. WEBB: Case number 01-1859 civil, Irving Rosner, et al. versus United States of America.

Counsel, please state your appearance the.

MR. DUBBIN: Samuel J. Dubbin, Your Honor, for plaintiffs. Class counsel.

MR. CUNEO: Jonathan Cuneo for plaintiffs. Class counsel.

MR. WALTON: Brent Walton, for plaintiffs, class counsel.

MR. KRAVETZ: Jeffrey Kravetz, for plaintiffs, class counsel.

MR. STANLEY: Jeffrey Stanley, for plaintiffs, class counsel.

THE COURT: Good morning, Mr. Stanley. I got your letter about the need for a possible Hungarian interpreter, which we will have at 10:30 beaming in from Washington, D.C.

MR. MERON: Good morning, Your Honor. Daniel Meron United States Department of Justice, for the United States.

THE COURT: Good to see you, Mr. Meron.

MR. SMITH: Good morning, Your Honor. Jeffrey Smith, United States Department of Justice, for the United States.

MR. NEUBORNE: Judge, do you want to note the appearances for counsel for the objectors at this point, or do you want to wait until later?

THE COURT: Well, I will take everyone down now.

Everyone can have a seat. And if anyone wants to announce their appearance, they can do so now.

MR. NEUBORNE: Burt Neuborne, on behalf of the 12 Hungarian objectors.

THE COURT: Anyone else? I see Congresswoman Ross-Layton here this morning. Good morning Congresswoman.

MR. CUNEO: Judge, we would either be pleased to read Mr. Sessler's statement into the record, or to continue with Professor Neuborne.

THE COURT: What I thought we would do is continue with the Professor, and then when he is finished we will read Mr. Sessler's letter into the record. And then we will hear from Mr. Lichtman.

Is Miss Lazar here? (No response.)

And Mr. Schwarz -- Oh, his daughter is here. Okay.

What about Gabriella Lazar, is she here? I don't see any hands.

Okay, Professor.

MR. NEUBORNE: Thank you, Your Honor. Good morning. My name is Burt Neuborne. I represent 12 class members residing in Budapest, and I believe, although obviously it is not official, that they speak on behalf of the great bulk of the Hungarian Jewish community in accordance with the representations to the Court made by Mr. Sanbar.

THE COURT: Can you please tell me the names of the individuals you represent?

MR. NEUBORNE: I am going to read them to you.

THE COURT: Just so the record is clear; and my Court Reporter can have a heart attack.

I think I have a list of who you represent someplace, but it would certainly be of great assist --

MR. NEUBORNE: Of course. I should have brought the list myself. I filed a notice of appearance on it.

I'm afraid --

Would you mind, Your Honor, if I just handed them to your Court Reporter? I'm really afraid I would make an impossible job of reading them.

THE COURT: And my Court Reporter would love it if you simply gave him the printed list of the 12.

MR. NEUBORNE: Your Court Reporter is ahead of us, Your Honor. He has the list.

THE COURT: Then we have to give credit to my law clerk. She was putting together a list of all of the individuals that we needed to make sure we had their names down correctly.

MR. NEUBORNE: May I begin, Your Honor, by on what I hope is a positive note, by stating the positions of the settlement that my clients, and I believe the Hungarian Jewish community, supports wholeheartedly. First, the acceptance of responsibility in this settlement is an extraordinary achievement. I know from personal knowledge that acceptances of responsibility in other Holocaust cases have been very difficult to achieve and often have not been achieved. So this is a substantial achievement, and I congratulate the lawyers and the United States for the acceptance of responsibility statement.

The amount seems fair, and we have no quarrel with the amount.

The thoughtful decision of the parties to recognize that this cannot be distributed on a per capita basis to the class and, therefore, using the cy pres doctrine that it should be distributed to the poorest members of the Hungarian survivor community again strikes me and my clients as a thoughtful and excellent resolution.

And, finally, because I appear here as an objector, I want to state for the record how thoughtful and I think excellent the legal work has been on both sides. Plaintiffs' attorneys I think did a splendid job, and the government lawyers did a wonderful job, and as you pointed out at the beginning of the morning, was an excellently lawyered case, and my clients appreciate it.

The only quarrel that we have with the settlement is the allocation formula, the ultimate allocation formula.

THE COURT: So you are withdrawing the question about the legal fees?

MR. NEUBORNE: If you don't mind, I will mention that at the very end. Representations have been made to me this morning that indicate that I should not go forward on that. But I'll deal with that, if you don't mind, at the end.

THE COURT: Okay. I'm just trying to find out -- It sounded to me like your objections were being narrowed, and I just wanted to make sure I understood how narrow they were. You are telling me that they are not quite as narrow.

MR. NEUBORNE: I will do the fees first, Your Honor.

THE COURT: Okay.

MR. NEUBORNE: As you know, my objection to the fees was based on an effort to apply the common fund rules to this. And the common fund rules essentially try to mimic what the market would be for this type of activity. And this is activity that often requires a risk multiplier, it often requires inducements to see to it that lawyers will take whatever risks and invest whatever time and capital is necessary to have cases like this brought.

And my only concern was, not with the actual fee application here, which I thought was rather modest compared to what it might have been under Eleventh Circuit standards, but with whether or not it actually mimicked the market in Holocaust fees, because I know from my own experience fees in other cases have been considerably lower. And I know of no case in which it has gone above five percent. So my concern was, was there another --

THE COURT: Excuse me. Didn't you receive 4.4 million yourself in another case?

MR. NEUBORNE: Yes, I received a very generous fee in another case. It was part of a settlement award, Your Honor, of 1.25 percent. The recovery in that case was 5.2 billion dollars. And so --

THE COURT: And it covered a much larger class.

MR. NEUBORNE: Yes. It was a very, very large class.

THE COURT: In fact, about ten times the size of this class.

MR. NEUBORNE: Perhaps more. It covered all surviving Holocaust victims, including Eastern European victims who don't fall into the usual category of victim. Virtually everybody living. It covered Poles, it covered Romanians. So it was a very, very large class.

As long as we are going to put that on the record, Your Honor, I have no quarrel with that. But I would like the record to reflect that I initially -- I served without fee in the Swiss case. I am the lead settlement counsel in the Swiss case in which I served without fee now for almost seven years. That is a 1.25 billion dollar recovery. I was the principal lawyer who put the class together, the theories together, I argued the case, participated in the negotiations, and lead settlement counsel, and have received no fees in that case at all.

I initially --

THE COURT: I just raise the question --

MR. NEUBORNE: Well, Your Honor, as long as you raise it, I think I have to put it on --

THE COURT: You had made some comment that just triggered --

MR. NEUBORNE: I just want to make sure that the record was clear, Your Honor, if you raised it. I did not seek fees in the German case. In fact, I declined to seek fees in the German case, the case you mentioned, until it was pointed out to me that the fee structure in that case was a maximum minimum, and that the number of applications that had been filed were so huge that it was clear that the maximum was going to be hit. Therefore, if I would have filed, it would not in any way adversely affect money that would go to Holocaust survivors. And when that was pointed out to me with great clarity, I then realized that my application competed solely against the other lawyers and not against the Holocaust victims. And that is why I filed an application. And the two arbitrators in that case, Kenneth Feinberg and Nicholas deB Katzenbach, after looking at the various work that the lawyers had done, found that my work was quite important in that case and were very generous in giving me a fee that I did not expect. But I accepted it, I am grateful to have it, and that's the full story of how it came to pass.

The plaintiffs' lawyers -- and what I was concerned about in this case is that we not alter the market in Holocaust cases, which has been about somewhere between 1 percent, never more than 5 percent in a fee case, and that this would take the fee structure higher than it has ever been before.

And I questioned whether or not there was an artificial market in Holocaust cases that enabled lawyers who handle these case at considerably submarket rates, in which case the class was entitled to the lowered market, not the actual market.

Counsel represented to me that they attempted to induce lawyers who had been handling these cases pro bono to take these cases, and this case, and they failed. Now, if that's -- And I accept that. That is a representation that was made to me this morning. I accept that representation. If that is true, then there wasn't some other market out there that they failed to tap into. They had to do this on their own, and having done this on their own I have no quarrel with the size of the fee they are seeking.

If there was not another market out there that they should have tapped into that they didn't, then the size of this fee is modest, the size they are seeking is modest and it seems to me appropriate. And so I have no quarrel with it, accepting the representations that were made to me this morning, that efforts were made to find lawyers who could do this for less.

THE COURT: Okay. So then based upon what you are saying, and I don't want to put words in your mouth, but I want to make sure I understand what you are saying, then you only have one objection --

MR. NEUBORNE: Yes.

THE COURT: -- and that is the allocation.

MR. NEUBORNE: Yes.

THE COURT: So my initial assumption that there wasn't an objection to the fees is correct, based upon your understanding --

MR. NEUBORNE: That's right. Based upon the representations that were made to me this morning.

THE COURT: Okay.

MR. NEUBORNE: The allocation formula, though, is something that I think cannot be ignored because the allocation formula purports to allocate these assets on the basis of national population figures, not on the basis of need, on the basis of where the needy are.

Now, if the needy were randomly distributed around the world, then national population figures would just be a convenient way of distributing the funds in a way that would reach the beneficiaries in an equitable and appropriate way.

But we know. We know. We know because we have administered the Swiss cases, we know because all you have to do is take a look at the economic data that is in the world. Poor survivors are not randomly allocated around the world. Poor survivors are concentrated in areas that have had serious economic and social dislocation; mostly Eastern Europe. A disproportionately high percentage of the survivors in the Eastern European countries are extremely poor. And if the funds are to be --

THE COURT: And how are you defining "poor"? That has been the biggest difficulty with the whole issue. How do you define who is poor and who is poorer than someone else?

MR. NEUBORNE: It's a calculation that can be made on the basis of investigation into the economic circumstances of the various persons.

A person in Budapest who needs food, clothing, and warmth, is considerably poorer than a person in Dade County who requires assistance. There is no question humanitarian assistance would be helpful in improving the quality of life, but they are not about to starve, they are not about to do without fuel in winter, and they are not about --

THE COURT: Let's not take South Florida, because we don't have the heating issues. Let's take New York. I mean, they have heating issues and there will be significant heating issues given the price of oil.

MR. NEUBORNE: I don't suggest -- Any survivor of Hungarian origin residing in the United States who would meet a level of want that involved the need for assistance in heating, or the need for assistance in food, or the need for assistance in clothes, should be treated identically with a Hungarian survivor in Budapest. All I'm asking --

THE COURT: And that's my question. How do I, without, A, delaying the settlement, B, using up the funds that should go immediately and promptly to helping people, using up the funds to do an analysis of assessment of needs, how do I do that?

MR. NEUBORNE: I think you do exactly what we did in the Swiss case. We were able in the Swiss case to do an assessment of the relative need of survivors in the Soviet Union and survivors in other parts of the world.

THE COURT: How long did that assessment take? How much did it cost?

MR. NEUBORNE: I can provide the Court with those figures. I can say that it did not take an inordinate period of time and it was not expensive.

THE COURT: How long did it take?

You have to understand, Professor, you filed the objections last July. You know, I'm a lowly trial court. I am the court of rough justice. But I need the facts. Arguments are great.

I respect counsel and the arguments that fine counsel make, but I can't get to the arguments unless I have the facts and the evidence.

MR. NEUBORNE: And I hope I can give you some facts. Can I just start with some law? And the law is I don't think you have a choice. I do not think you have a choice.

THE COURT: Then you are holding up everything if you had these resources to tell me what the costs were back in July, and you have not given me anything here at 11:15 on September 26.

MR. NEUBORNE: Your Honor, I represent 12 people in Budapest. They don't have the resources to do that. The Claims Conference has indicated to me they are prepared to do the assessment. If the Claims Conference will do the assessment, then Your Honor has the data that would be needed to make an allocation on the basis of need and not on the basis of a formula, which certainly overstates the amount --

THE COURT: Professor, share with me why you didn't bring me the data -- Instead of saying that they can give you the data, why didn't you do an assessment and file it with the Court with your objection saying, "This is what it takes, this is how long it will take, this is what the costs will be," and then start talking to others so that when we came in here today we would be that much farther ahead to support your theory?

MR. NEUBORNE: Your Honor --

THE COURT: Just tell me why you didn't do that.

MR. NEUBORNE: Why I didn't do that?

THE COURT: Yes.

MR. NEUBORNE: I don't have the resources to make that assessment. I telephoned the Claims Conference, asked them whether they could do --

THE COURT: Professor, when did you telephone them?

MR. NEUBORNE: When did I telephone them? A week after -- even before I filed the objections. A week after I filed the objections.

THE COURT: And when you telephoned them, did you say how much time would it take and how much would it cost?

MR. NEUBORNE: I did not.

THE COURT: Why not?

MR. NEUBORNE: I did not because it occurred to me first we had to deal with whether or not the existing formula was going to be changed. If the Court is not going to change the existing formula, then it is a dead-weight loss to go through a long process of assessment --

THE COURT: Professor, how much time would it take in the phone conversation with the Claims Conference to just ask them to give you the estimates of those two things? And then doesn't that provide some beef, so-to-speak, to use the cliche, to your argument to say not only does the law support this, but as a practical matter this is very easy to accomplish, if it is as easy to accomplish as you say?

MR. NEUBORNE: They told me that it was practically doable and that it could be done quickly. Those are the two things they told me. That was enough to satisfy me that we should go forward and object.

Now, Your Honor --

THE COURT: You have not spent a lot of time cross-examining witnesses.

I mean, do you see why I am frustrated?

MR. NEUBORNE: I know.

THE COURT: You are the person who is raising it, but you are just giving me argument, you are not giving me facts, and you could have pressed them a little harder --

MR. NEUBORNE: Your Honor, Mr. Taylor is in the courtroom today, the head -- the operating head of the Claims Conference. He is here. And if you want to ask him the question of how long it will take and how much it will cost, he is here to tell you that.

THE COURT: But I am just saying, Professor, it would have been a real kindness on your part and very helpful to the Court if you had done the work. But I'll be glad to do the work for you.

MR. NEUBORNE: Well, I appreciate that, Your Honor. I apologize to the Court if I have not fulfilled what you understand my responsibilities to the Court are. Had I thought that --

THE COURT: I expect that the lawyers bring the evidence into the Court. I'm not an investigative body. I have a mighty team, Professor, of my Courtroom Deputy and my three law clerks; and if you want to add my Court Reporter, we can add him, but he is busy taking everything down as opposed to going out and researching things for me.

I presume that I am generously endowed compared to what a law Professor has in the way of staff, and I accept that. But I need for the lawyers to bring --

MR. NEUBORNE: I accept your criticism, Your Honor. I should have brought you additional facts. My assumption was that it was so clear that using population quotas did not provide an adequate proxy of need.

Your Honor, the United States is the second-largest per capita economy in the world; $40,000 per person. Hungary is $13,900 per person. That is common knowledge. Israel is 46th with $20,800. All one has to do is look at the population figures and the gross amount of money available in each country and it is clear that there is very high likelihood that there is a more-significant incidence of very poor people in Hungary, very poor Hungarian survivors in Hungary, than there are in the United States.

At that point I suggested to the Court what I think -- because I don't want to hold up the settlement. I suggested that the agreement that all the parties had come to, which is to shift ten per cent, ten per cent to Hungary, would approximate, would approximate that differential and would do so in a way that would not slow settlement down, would do so in a way that would not be terribly expensive.

I agree, Your Honor, this is not a case where you want to spend scarce funds doing a person-by-person survey and census of every poor Hungarian victim around the world. That would be, I think, an inefficient use of scarce funds.

THE COURT: And it would be a breach of my fiduciary duty.

MR. NEUBORNE: And that is why I didn't ask them to do it; that is why I didn't spend scarce money doing it myself. But it is clear from the known facts that there is a mismatch between national population quotas and the needy populations of each country.

The creative solution to that is the solution that Mr. Sanbar suggested and which he had the initiative to engineer, and that is to ask the parties to shift ten per cent of the funds. Is that perfect? It is not. I believe that if we did a person-by-person, we would shift much more. But it is acceptable to the Hungarian Jewish community, it is acceptable to the Hungarian Jewish survivors living in Israel. It is close enough given the resources available to the Court that it is I think the fairest way to do it.

May I say, if we don't do it, if we don't do it, if Your Honor believes that either because of my own failure in providing you with enough evidence or with some other justification, Your Honor feels that you are going to go forward with the population allocation as opposed to an allocation that attempts to link the settlement to need, the settlement is I think vulnerable to collateral attack almost certainly under Amchem, because what you have is, you have class action lawyers essentially bargaining away the rights of Hungarian victims and --

THE COURT: Wait a minute.

MR. NEUBORNE: -- and if they were to challenge that later, they would be able to open the settlement. So I think the only way to make the settlement lock proof and against collateral attack is to try for an approximation of need. And that is what I am urging the Court to do. I am not urging the Court to expend scarce resources; I am not urging the Court to do a person-by-person census. I am urging the Court to recognize that there is a certain mismatch, a virtually certain mismatch between national population quota and need, and to impose a corrective solution of ten percent.

THE COURT: But, Mr. Sanbar tells me he picked ten percent because he picked ten percent. I mean, how do I justify the percentage that I pick, if I, one, choose to change; two, how do I do it at this late stage since I have difficulty since the settlement that we have proposed and that everybody has had a chance to opt out of said one thing and then we are sort of changing horses midstream? I have great difficulties and concerns about that from a due process perspective. So those are two things that concern me.

But I have to tell you, I am a very practical human being. I took an oath when I took this job to use what God has given me to the very best to do what is right, fair, and just, with, hopefully, compassion and humility. And that's the only reason why I had this little discussion with you.

It is very frustrating for a Court to have lawyers come in, make wonderful arguments but not give me any facts and give them to me in advance so that everyone can see what it is before we come into the courtroom. That's what I look to lawyers to do, particularly in a case that goes back 60 years from the inception of the facts here, and have so many emotions involved that this case does. And, so, it was very important to me, Professor, that this hearing today really be one to bring closure.

I have shared with you my frustration. I have gotten it off my chest and will now move forward.

MR. NEUBORNE: And I will say that the ten percent figure, Your Honor, is a rough approximation, after discussion among the parties, to --

THE COURT: And when you say parties, tell me who.

MR. NEUBORNE: When I say parties, I mean the groups that Mr. Sanbar met with in Israel and in Hungary.

THE COURT: And was there any discussion with class counsel and with the defendants on this to get their input? I mean, you have to admit they have been very creative, they tried to do what is right and fair here, and I sensed a reasonableness, or I have tried to encourage reasonableness, by all persons. And, so --

MR. NEUBORNE: Your Honor, I filed my objection on August 1. If there was to be discussion, discussion could take place after August 1. No one has suggested a willingness to discuss anything. It was simply a Court Order setting out a schedule to raise an objection. I followed that Court Order.

I'm sorry you don't think that I gave you enough facts. But I simply want to reiterate that I think that the settlement will be vulnerable, vulnerable to an appeal and vulnerable to collateral attack, unless we take some steps.

THE COURT: What is the difference between collateral attack and an appeal?

MR. NEUBORNE: Well, collateral attack would be people that I have nothing to do with who will challenge it at some later point claiming that the settlement was fundamentally unfair because it violated Amchem because the class counsel did not adequately represent the interests of the Hungarian class members, and essentially favored the interest of the United States' participants at the expense of persons living in foreign countries who were not at the table. And that's a serious -- I mean, it is a serious potential flaw. And they would be able under the due process clause to claim that the Court could not provide final determination as to their rights in the absence of fair representation from class counsel. That is what Amchem was all about. They vacated that settlement because there was a part of the class that had been inadequately represented in their relationships with the rest of the class. That's all I mean, Your Honor.

THE COURT: Professor, tell me what you teach at law school.

MR. NEUBORNE: I teach first-year procedure, evidence, federal courts, and constitutional law. I have been on the NYU faculty for 35 years.

THE COURT: May I just ask you when teaching your civil procedure course that you share with your students one of the things that the judges find most helpful, and that is, although we are an adversary system, often times it is more helpful if lawyers keep in mind that what lawyers need to do is help their clients resolve and avoid conflict, and that lawyers wear not only the hat of the advocate but also the hat of counselor and the advisor.

So I appreciate very much that you are trying to help me make sure that I do the right thing, and I want to thank you for that.

MR. NEUBORNE: You are welcome. Your Honor, I take as implicit your criticism that I should have done something earlier. I accept it and I will take it to heart.

THE COURT: And I just wish that all the parties, when you had filed the objection -- and I will share with you one of the nice things about being the Judge is that you to a certain extent are above the fray and you can see human issues that are woven through any dispute before the Court, not only the human issues that the clients raise, but also the human issues and the interdynamics that are created by counsel.

One of my desires always is to promote professional relations between lawyers. Clients come and go. We don't make the facts that our clients give us. We do the best that we can to present them so they have a fair opportunity. And so what my desire is always is that counsel recognize that even though they have differences of opinions as to how things can be resolved, that it is very helpful to the Court if they will attempt to have a professional dialogue before they come in and really develop an ability to hear what the other person is saying so that we can attempt to seek to understand before we seek to be understood.

MR. NEUBORNE: I appreciate that, Your Honor. You realize, of course, it was very difficult to speak before the proceeding because of the pendency of the Second Circuit appeal on the identical issue in the Swiss case. Counsel have pursued separate theories of distribution in both the Swiss case and this case, and the Second Circuit decision was not decided until September 9. That means that discussion while that Second Circuit decision was pending, while it might have been interesting, struck me as being futile, because no ruling could be made until the Circuit had decided the case.

And, of course, as you know from looking at that

Opinion, the Circuit strongly, strongly, disapproves the national quota settlement as opposed to some effort to find a mechanism of taking need into account. And the mechanism that Mr. Sanbar suggested, the mechanism that I suggest, is a rough justice mechanism. It is not a mechanism that will cost money or take additional time. It is simply an acknowledgment that the population figures are not an accurate proxy and that a ten percent reapportionment will get closer to an ideal that it is simply too expensive and too difficult to attain. And that's the argument that I make to you. That is why I didn't come here with an enormous record.

You are right. It would unnecessarily spend resources, shifting a relatively small amount of money. We are only talking about a shift of approximately 2, 2 and-a-half million dollars. It is wrong to spend vast amounts of resources on an issue of that size. But a shift of two and-a-half million dollars, a shift of approximately ten percent, recognizes the existence of the problem, shows a good-faith effort to achieve it, and does so in a reasonable way given the resources and the time available. And I represent to you with all my heart that is all I was trying to do here.

THE COURT: And just to follow up, what you are saying is that is also consistent with the fact that part of the original discussion of the United States with former Communist-controlled Hungary, and the successor governments following World War II, was that there would be some type of accommodation back to those continuing to live in Hungary. So that they should, in addition to the need issue, there is a certain --

MR. NEUBORNE: Kind of an implicit promise that still has not been kept. I had not thought of that, Your Honor. But I think that is exactly right. Thank you.

THE COURT: Okay.

Shall we have Miss Schwarz?

MR. WALTON: Might I remind Your Honor about reading of Mr. Sessler's letter?

THE COURT: Yes.

Miss Schwarz, before you begin, if we could just read Mr. Sessler's --

Do we know how he is?

D&F
c/m

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE: HOLOCAUST VICTIM ASSETS LITIGATION

This Document Relates to: All Cases

Case No. CV-96-4849 (ERK)(MDG) (Consolidated with CV-99-5161 and CV-97-461)

MEMORANDUM

KORMAN, Chief Judge:

Several appeals from decisions I have issued in this case are currently pending before the Second Circuit, and Professor Burt Neuborne has filed briefs defending the positions I have taken. When Professor Neuborne sought to file his briefs, however, he was asked by the Clerk of the Court for the Second Circuit what standing he had to file briefs and whom he represents in the appeals. The Clerk of the Court was under the impression that Professor Neuborne did not represent anyone. I file this memorandum to clarify the role that Professor Burt Neuborne plays in this lawsuit and in the current appeals.

As an initial matter, I agree that Professor Neuborne does not represent any party in the context of the current appeals. By submitting briefs, Professor Neuborne is simply providing an adversarial defense of my position for the benefit of the Second Circuit. In this sense, his current role is analogous to that of a lawyer who might be appointed to defend a judge's decision after a writ of mandamus. In the typical case where a writ of mandamus is sought, the party to the case that benefitted from the underlying ruling will defend the judge's position on appeal. At times, however, there is no such party. For example, in a case where I decided to transfer a wiretap application to a magistrate judge for authorization, the United States Attorney sought a writ of mandamus, arguing that a magistrate judge would lack the power to order a warrant. See In re United States, 10 F.3d 931 (2d Cir. 1993). Because of the ex parte nature of the wiretap application, there was no opposing party. Indeed, if the subject of the wiretap had been a party, he may have taken the same position as the United States Attorney. Thus, I received permission to retain counsel to be paid by the Administrative Office of United States Courts to provide an adversarial defense of my position in the Second Circuit. A similar situation arose recently for Judge Kram in the Southern District of New York, who had a party seek a writ of mandamus after she made certain rulings in the Austrian bank litigation—she appointed David Boies to defend her position on appeal. See In re Austrian, German Holocaust Litigation, 250 F.3d 156 (2d Cir. 2001). While the current appellants do not seek a writ of mandamus, the same need for an adversarial defense of my position in the Second Circuit exists. Currently, Professor Neuborne is simply performing that service. Although his role in the appeals is thus limited, I do not wish to diminish the other roles that Professor Neuborne has played in this lawsuit.

Professor Neuborne played a vital role in achieving the historic settlement in this case. As I have already written:

> Professor Neuborne was a founding member of the Plaintiff's Executive Committee where he was the glue that held it together, and he was intimately involved in every significant aspect of the case. After the preliminary approval of the proposed settlement and the provisional certification of the class, he was designated lead plaintiffs' counsel.

In re Holocaust Victim Assets Litigation, 270 F. Supp. 2d 313, 316 (E.D.N.Y. 2002).

Professor Neuborne has also played a vital role since the settlement. He has continued to represent the plaintiff class in post-settlement litigation involving the bank defendants. See In re

Holocaust Victim Assets Litigation, 282 F.3d 103 (2d Cir. 2002) (where Professor Neuborne represented plaintiffs in dispute over definition of the Slave Labor II class); In re Holocaust Victim Assets Litigation, 256 F. Supp. 2d 150 (E.D.N.Y. 2003) (where Professor Neuborne represented plaintiffs before Judge Block arguing that the defendants had to pay compound interest on settlement funds placed in escrow). He has continued to represent the plaintiffs in negotiations with the banks regarding increased access to bank records. See In re Holocaust Victim Assets Litigation, No. 04-CV-1786 (E.D.N.Y. 2004). And he has represented the plaintiffs against the attempt of non-party intervenors to diminish the stake of the plaintiff class. See In re Holocaust Victim Assets Litigation, 225 F.3d 191 (2d Cir. 2000) (where Professor Neuborne represented plaintiffs in dispute over whether the definition of Victims of Nazi Persecution had to be extended to include ethnic Poles). Professor Neuborne's efforts in these matters have resulted in tangible and substantial benefits to the class of plaintiffs as a whole.

On other issues, Professor Neuborne acts as something of a general counsel to the administration of the settlement fund. He provides an invaluable administrative service of helping people gain access to me and to the Special Master. He also provides advice as amicus curiae. Professor Neuborne has submitted many insightful declarations and, because of his long involvement in this case, his opinion is one that I respect. In this capacity, however, Professor Neuborne's recommendations have never been binding on me. In fact, in the context of the various appeals now pending before the Second Circuit, on more than one issue I decided to exercise my discretion in a manner different from that suggested by Professor Neuborne.

In sum, because this case resulted in a settlement fund that now needs to be administered, I have a fiduciary duty to the plaintiffs to ensure that any resulting distribution is fair and that any award of counsel fees is justified. See Reynolds v. Beneficial Nat. Bank, 288 F.3d 277, 279-80 (7th

Cir. 2002); Maywalt v. Parker & Parsley Petroleum Co., 67 F.3d 1072, 1078 (2d Cir. 1995). Various organizations and individuals who have been dissatisfied with my decisions are represented by their own counsel on their appeals. Professor Neuborne is providing an adversarial defense of my rulings where the principal beneficiaries of them do not have the resources to appear, as in the appeal involving Holocaust Survivors Foundation-USA, or where the detriment to any particular class member may not be of sufficient magnitude to warrant the cost of appearing, as in the remaining appeals.

Dated: September 18, 2004
Brooklyn, New York

Edward R. Korman
United States District Judge

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Burt Neuborne
John Norton Pomeroy Professor of Law
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September 14, 2004

Hon. Edward R. Korman
Chief Judge
United States District Court
for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *In re Holocaust Victim Assets Litig.*,
CV-96-4849

Your Honor:

I write in response to your order dated September 13, 2004 describing my role in defending the current appeals pending the United States Appeals for the Second Circuit in 04-1898; 04-1899; 04-2466; and 04-2511. I am honored to appear in defense of your orders, and have no quarrel with your description of my role in assuring that the Second Circuit is provided with a full adversary defense of the challenges to your orders.

I do, however, take issue with your statement that I do not represent any party in the context of the appeals. You may recall that in January, 1997, at your request, all counsel appointed me as co-counsel for the numerous named-plaintiffs. Moreover, in the eight years that I have worked on this case, I have established close personal relationships with many, many members of the plaintiff-class who rightfully view me as their lawyer. Most importantly, on February 1, 1999, when I accepted your request that I agree to serve as Lead Settlement Counsel, I entered into an intense attorney-client relationship with the class that continues to this day. Thus, when I appear in defense of your rulings, I do not appear solely as a functionary of the Court, but as Lead Settlement Counsel for the plaintiff-classes with a duty to defend your rulings as long as they are supported by law, or rest within your discretion.

As a practical matter, we reach the same conclusion. But I think it important to place on the record my conception of my role as Lead Settlement Counsel. As you point out in your order, in most contexts, I play a classic adversary role in defending the plaintiff-classes against efforts to dilute the settlement fund or to place obstacles in the administration of one or more of the plaintiff classes. In addition, during the day-to-day administration of the settlement fund, I seek to provide the Court with legal counsel concerning the innumerable decisions that must be made in an undertaking of this magnitude. In each of those settings, I function as a lawyer for the plaintiff classes.

Given the extraordinary nature of this class action, I accept a responsibility, as well, for defending the mechanism chosen by the class to develop a plan of allocation and distribution of the assets. As you know, the class opted for a bifurcated process under which you initially upheld the fairness of the settlement and provided for a fair mechanism for developing a plan of allocation and distribution. The plan calls for the appointment of a neutral Special Master who would confer widely with the class before recommending allocation and distribution decisions to you for final resolution after an appropriate hearing. As you recall, we asked the class to opt for such a process to avoid the plunging elderly Holocaust survivors into an adversary war of all against all in an effort to maximize shares in a limited settlement fund. Any member of the class who was unwilling to commit in advance to respect the outcome of such a fair process was given the right to opt out at the fairness hearing. Fewer than 300 persons opted out. At least 564,000 persons expressed approval of the mechanism.

In the almost five years that I have functioned as Lead Settlement Counsel I have viewed my role as implementing the class's overwhelming decision to opt for such a fair allocation process. As you note, I have sought to facilitate open communication between any member of the class and the Special Master, as well as the Court. I have advised class members on the best way to present their concerns to the Court. I have provided the Court with personal views on allocation and distribution decisions. But, most of all, I have committed myself to defending the results of the process, even when I do not wholly agree with the outcomes.

In my view, the key to the success of the Swiss bank settlement was the willingness of the class to bind themselves in advance to respect the results of a fair allocation and distribution process. I consider myself to have made the same commitment. Indeed, since I urged others to make the commitment, I accept a special responsibility to defend the results of the fair process, as long as they are in accordance with law or rest within the parameters of the Court's discretion.

Thus, as applied to the pending Second Circuit appeals, we come out in the same place - a firm duty on my part to defend your judgments. You appear to view the duty as flowing from your appointment of me as your lawyer. I view my duty as flowing from my duty as Lead Settlement Counsel to defend the outcomes of the fair decisional processes that make the administration of the settlement possible.

If I believed that your rulings were not in accordance with law, or were an abuse of your very broad discretion, I would not defend them. Indeed, if I believed you were acting unlawfully, as Lead Settlement Counsel for the class, I would oppose your orders. If you removed me as Lead Settlement Counsel, I would oppose the orders on behalf of the numerous individuals who view me as their lawyer. While, given my deep respect for you, I do not believe that such an eventuality is even remotely likely, it is important that my understanding of my status be placed on the record.

Sincerely yours,

Burt Neuborne